NO. 80-977

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

RAYMOND CLINTON HULLUM, JR.,
Petitioner

VS

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF PER SC 22.6

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MEMBER: BAR OF U.S. SUPREME COURT

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TO THE HONORABLE COURT:

I.

In the recent case of U.S. vs SUTTON, No. 79-5681, 5th Circuit, Unit A (Cole C. Clark and Reavley) under date of Feb. 2, 1981 (see Appendix), the Fifth Circuit condemned the use of a Mann-type charge.

This is called to this Court's attention via a Supplement (SC Rule 22.6) because it adds fuel to the basis of jurisdiction and goes directly to the point set out in IX. SC Rule 21.1(j), B at page 21, et seq., of HULLUM's PETITION FOR WRIT OF CERTIORARI herein.

The charge given in SUTTON is herewith overlapped on the charge given in HULLUM:

> (SUTTON's charge is in parentheses in italics with the non-parenthetical portion being the same in both charges. Those portions of HULLUM's charge not in SUTTON are underlined.)
>
> > *(As a general rule,)* *(I)*t is reasonable to infer that a person ordinarily intends *(all)* the natural and probable consequences of <u>his knowing acts</u> *(acts knowingly done or knowingly omitted. So, unless the evidence in the case leads the jury to a different or contrary conclusion,)* *(T)*he jury may draw the inference that the accused intended all of the *(natural and probable)* consequences which one *(,)* standing in like circumstances *(,)* and possessing like knowledge should reasonably have expected to result from any <u>intentional act or conscious omission</u> *(act knowingly done or knowingly omitted by the accused)*. <u>Any such inference drawn is entitled to be considered by the jury in determining whether or not the Government has proved beyond a reasonable doubt that the defendant possessed the required criminal intent</u>.

The Fifth Circuit in SUTTON condemned this charge and tested it by questioning its harm to SUTTON's case; then said:

> "We are constrained to hold, and do hold, that in this factual and legal context the

use of the Mann instruction was reversible error."

The Court noted that there was a serious question of SUTTON's intent in the conspiracy.

The Fifth Circuit in HULLUM approved this charge and did not test its harm to HULLUM where HULLUM's defense went directly to his intent.

The two cases are patently in direct conflict.

II.

In MANN 319 F(2) 404 (5th 1963), the offending words isolated by the Court were, *"So unless the contrary appears from the evidence..."*. In SUTTON the comparable words were, *"So, unless the evidence in the case leads the jury to a different or contrary conclusion..."*.

The comparable language in HULLUM is, *"...before convicting a defendant, the jury be satisfied from all the evidence in the case of the defendant's guilt beyond a reasonable doubt." (9/1135);* and *"Such intent may be determined from all of the facts and circumstances surrounding the case." (9/1138).*

Although these words were not in apposition to the charge on inference of intent which appears at 9/1137, yet the jury were told that the charge given them was the law of the case and they were "duty-bound" to follow it (9/1130); and further, they were thereafter instructed:

> "You are not to single out one instruction alone as stating the law; you must, rather consider the instruction as a whole." (emphasis added), at 9/1130.

which was in accord with CUPP 414 US 141 (1973) and contra to CHIANTESE 560 F(2) 1244 (5th 1977) which the lower Court followed in the case at bar.

THUS ANY DIFFERENCE URGED TO THE FACT THAT THE OFFENDING WORDS WERE NOT IN APPOSITION TO THE CHARGE OF INFERENCE OF INTENT IS RAPIDLY DISPELLED FOR THE INSTRUCTIONS MAKE ANY DIFFERENCE IN SYNTAX BETWEEN THE CHARGES IN MANN, SUTTON AND HULLUM A DISTINCTION WITHOUT ANY LEGAL MERIT WHATSOEVER.

And further, it is patent that no substantial difference in meaning obtains between the verbiage of the complained of offending language of MANN, of SUTTON and of HULLUM.

III.

SUTTON and SANDSTROM 442 US 510 (1979) and ULSTER COUNTY COURT 442 US 140 (1980) make it clear that the test of charges like the one at bar where the attack is a complaint of impermissible burden shifting is two-fold:

1. Could the charge have been read by a reasonable juror to shift the burden? SANDSTROM and ULSTER COUNTY COURT say this. So does TYLER 622 F(2) 1972 (5th 1980) and SUTTON.

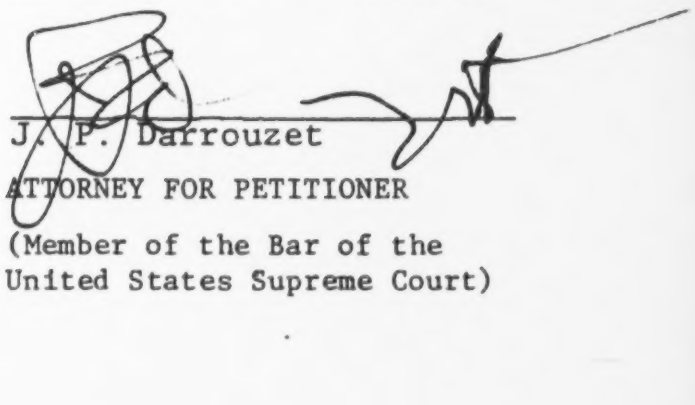
2. Does such a charge render harm to the defense? SANDSTROM and ULSTER COUNTY COURT say this. So does TYLER and SUTTON (as well as BAKER 619 F[2] 327 [4th 1980]).

The Court erred in HULLUM in failing to use either of these tests subscribed to by their own Circuit and this Court.

PRAYER

The prayer of HULLUM's Petition for Writ of Certiorari is respectfully renewed.

RESPECTFULLY SO PRAYED,



J. P. Darrouzet
ATTORNEY FOR PETITIONER
(Member of the Bar of the United States Supreme Court)

UNITED STATES of America,
Plaintiff-Appellee,

v.

John Ellis SUTTON,
Defendant-Appellant.

No. 79-5681.

United States Court of Appeals,
Fifth Circuit.
Unit A

Feb. 2, 1981.

Defendant was convicted in the United States District Court for the Southern District of Texas, George E. Cire, J., of conspiracy to dispense and distribute controlled substances and he appealed. The Court of Appeals, Coleman, Chief Judge, held that: (1) use of the Mann instruction was reversible error; (2) stop of automobile was a proper investigative stop based upon the reasonable suspicion that its occupants were engaged in criminal enterprise; (3) warrantless seizure and examination of contents of paper sack from pharmacy, lying in full view on front floorboard of automobile was not precluded by Fourth Amendment principles after valid stop of the automobile; and (4) search of briefcase taken from the automobile trunk was precluded by Fourth Amendment principles and the fruits of such search should have been suppressed.

Reversed and remanded.

1. Criminal Law ⇐778(6), 1172.2

In prosecution for conspiracy to dispense and distribute controlled substances, use of the Mann instruction, stating "it is reasonable to infer that a person ordinarily intends all the natural and probable consequences of acts knowingly done or knowingly omitted," was reversible error, in view of fact that proof of conspiracy was dependent upon inferences which jury might reasonably draw beyond a reasonable doubt from the recited occurrence. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846; U.S.C.A.Const. Amends. 4, 6.

2. Arrest ⇐63.5(6)

Police officer's stop of car was a proper investigative stop based upon the reasonable suspicion that the occupants were engaged in criminal enterprise, where he had prior knowledge of an investigation concerning the illicit activities of the husband of the woman to whom the car was registered and also had knowledge that another police officer had observed the occupants in pharmacy when one of them paid an inordinately high price for two prescriptions.

3. Searches and Seizures ⇐7(20)

Police officer's warrantless seizure and examination of contents of paper sack from pharmacy lying in full view on front floorboard of automobile was not precluded by Fourth Amendment principles, where the automobile had been properly stopped upon the reasonable suspicion that the occupants were engaged in criminal enterprise in connection with the payment of an inordinately high price for two prescriptions at the pharmacy. U.S.C.A.Const. Amend. 4.

4. Searches and Seizures ⇐7(10)

Police officer's warrantless search of briefcase taken from automobile trunk after automobile had been properly stopped upon the reasonable suspicion that the occupants were engaged in crim-

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inal enterprise was precluded by Fourth Amendment principles, and the fruits of such search should have been suppressed. U.S.C.A.Const. Amend. 4.

Appeal from the United States District Court for the Southern District of Texas.

Before COLEMAN, Chief Judge, and CHARLES CLARK and REAVLEY, Circuit Judges.

COLEMAN, Chief Judge.

Defendant John Ellis Sutton was found guilty of conspiracy to dispense and distribute Schedule II controlled substances in violation of 21 U.S.C., Section 846.[1] Sutton's co-defendant, Johnny Lester Randolph, was also convicted of the same charge but abandoned his appeal in return for a plea bargaining agreement. Sutton challenges his conviction on the ground that the jury charge shifted the burden in violation of his Sixth Amendment rights. He also asserts that a warrantless search of a paper sack and a briefcase found in the automobile, which he was driving, violated his Fourth Amendment rights.

On August 1, 1978, Houston police officer A. D. Dugger, while off-duty, but who had previous knowledge of two affidavits concerning illicit activities of Fisher's Pharmacy and one Dr. Edwards, saw defendant Sutton and another man at the Fisher Pharmacy in Pasadena, Texas. Officer Dugger saw the other man, whom he did not recognize, purchase two prescriptions, one for $90.00 and one for $108.00. He saw Sutton, whom he recognized by sight but not by name, walk up to the counter when a name was called. The officer followed the other man outside and saw him get into a 1976 Cadillac with three other people. Thereafter, officer Dugger returned to his car, radioed for assistance and ran a license check on the Cadillac, *which was found to be registered to the wife of Dr. Edwards.*

In answer to officer Dugger's phone call, Lt. Sidney Smith of the Pasadena Police Department arrived on the scene and observed the Cadillac leaving the pharmacy. Sutton was driving. Lt. Smith followed the Cadillac and had it stopped by a marked patrol car. After all the occupants were out of the car and checked for identification, Lt. Smith saw a Fisher Pharmacy sack in plain view, lying on the front floorboard. The sack turned out to be filled with prescription bottles containing Dilaudid and Tuinal. Lt. Smith saw that the names on the prescription bottles were not those of the occupants of the car, whereupon he arrested them for possession of a controlled substance. Lt. Smith then opened the automobile trunk, found Sutton's briefcase, searched it, and found it to contain papers later designated as government's exhibits 9 and 10 at trial.[2]

The only other evidence offered by the government which might link Sutton to Dr. Edwards, or to co-defendant Johnny

1. Section 846 states:

   Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

2. The briefcase contained a list bearing the names of husbands, wives and their addresses in the Houston area and note paper containing mathematical computations. Danny Hines whose name and address were on the list testified at trial.

Randolph, or to the alleged conspiracy, was testimony from Edwards' secretary that a man who called himself "Sutton" telephoned the doctor's office several times, plus testimony from another Edwards employee that Sutton and Randolph once met at a downtown office.

The Mann Charge

At trial, in pertinent part, the jury was charged as follows:

> As a general rule, it is reasonable to infer that a person ordinarily intends all the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the evidence in the case leads the jury to a different or contrary conclusion, the jury may draw the inference and find that the accused intended all the natural and probable consequences which one, standing in like circumstances, and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

Sutton adopted Randolph's timely objection at trial, stating the grounds in accordance with the requirement of Federal Rule of Criminal Procedure 30.[3]

It has been repeatedly held that the *Mann* charge in effect may shift the burden of proof from the prosecution to the defendant. It was condemned by this Court as early as *Mann v. United States*, 319 F.2d 404 (5th Cir., 1963), *cert. denied*, 375 U.S. 986, 84 S.Ct. 520, 11 L.Ed.2d 474 (1964). Nevertheless, trial courts continued to give the charge, with the result that we recently traced the history and continued use of the *Mann* charge in this Circuit in *United States v. Chiantese*, 560 F.2d 1244 (5th Cir., 1977) (en banc). In *Chiantese* the Court emphatically stated:

> No district court in this circuit shall include in its charge to the jury an instruction on proof of intent which is couched in language which could reasonably be interpreted as shifting the burden to the accused to produce proof of innocence.

Id. at 1255.

Furthermore, it was declared that no longer would we absolve such errors by looking to the whole charge for corrective phrases.

This should have been a formidable warning to prosecutors to have no more to do with seeking and using the *Mann* charge.

The tone of the banishment was tempered, however, with the observation that the use of the charge would not trigger *automatic reversal*. It was said:

> We refuse to classify the giving of a charge in violation of paragraph 1, *whether objected to or not*, as the type of error which will automatically produce reversal. If, despite our action today, the error should recur, the weighing of its harm to the accused shall remain a judicial matter to be resolved in the context of each case where it occurs. Such weighing, however, shall not include consideration of

3. FRCP 30 reads in pertinent part:

> . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

> whether a defective charge has been cured by prior or subsequent statements. (Emphasis added).

Id. at 1255.

It would appear that what the Court really was saying is that it was well aware of the *harmless error rule* which applies to many situations in which there is non-compliance with Constitutional guidelines. Otherwise, it would make no sense to blister this instruction in no uncertain terms and in the same breath to say that if the charge is given the harm will be evaluated before there is a reversal. The *spur* is that in making such an evaluation no attention will be paid to curative language which may appear elsewhere in the instructions.

So the question remains: Did the *Mann* charge harm Sutton's defense could it have been read to impose a burden on him to establish his innocence?

The evidence established that Sutton was in the drugstore at a time when a companion paid an inordinately high price for two prescriptions; that he followed the companion to a Cadillac and thereafter took the wheel. The controlled substances were then found on the front floorboard of the car, in a sack which came from the pharmacy. Therefore, any conspiracy, with the intent to participate in dispensing and distributing controlled substances, depended on inferences which the jury might reasonably draw beyond a reasonable doubt from the recited occurrence.

[1] We are constrained to hold, and do hold, that in *this* factual and legal context the use of the *Mann* instruction was reversible error. There was association but with no spoken proof of an agreement; Sutton was driving a car, also occupied by others, in which contraband was found. That contraband had been acquired in Sutton's presence. The proof was sufficient to go to the jury, but it should have gone there without the burden of the *Mann* charge.

The Search

Sutton moved to suppress the evidence and the testimony growing out of the warrantless search of the Cadillac he was driving on August 1, 1978. The motion was denied and the contents of the paper sack, found on the front floorboard, and the contents of the briefcase, found in the trunk, as well as the testimony derived therefrom, were admitted in evidence.

The Stop

[2] The stop of the Cadillac was a proper investigative stop based upon the reasonable suspicion that the occupants were engaged in criminal enterprise, *United States v. Allison*, 616 F.2d 779 (5th Cir., 1980). Lt. Smith's prior knowledge of the Edwards investigation and knowledge of Officer Dugger's observations in the pharmacy were enough to constitute "reasonable suspicion". In *Allison, supra*, we said:

> A police officer may make an investigative stop of an individual if he reasonably suspects that the individual is involved in criminal activity. Probable cause is not required to justify an investigative stop; reasonable suspicion is sufficient. [Citing] *United States v. Hall*, 557 F.2d 1114, 1116 (5th Cir., 1977). Nor was the stop unreasonable simply because [the officer] acted on

hearsay knowledge. Reasonable suspicion may exist on the collective knowledge of the police when there is reliable communication between the officer supplying the information and the officer acting on that information. [Citations omitted].

The Sack

The search of the paper sack is a different question. The Supreme Court has generally recognized an "automobile exception" to the requirement that police secure a warrant before conducting a search. See, e. g., *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). This principle has been limited, see *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979); *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). In *Sanders* the Court disapproved a warrantless search of luggage taken from the trunk of an automobile that had been lawfully stopped. The Court, stressing expectation of privacy, reasoned that the mere fact that personal luggage is taken from an automobile does not demonstrate the necessity of a warrantless search. "[T]he reasons for not requiring a warrant for the search of an automobile do not apply to searches of personal luggage taken by police from automobiles", *Sanders*, 442 U.S. at 765, 99 S.Ct. at 2593 94. However, the Court in footnote 13 stated:

> Not all containers and packeges found by the police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view" thereby obviating the need for a warrant.

Id. at 764 n. 13, 99 S.Ct. at 2593, n. 13.

In a recent case, *United States v. Rigales*, 630 F.2d 364 (5th Cir., 1980), this Court held that the search of a zippered case found in plain view on the floorboard of a lawfully stopped automobile was improper, citing *Sanders*. However, this decision rested on the premise that "[n]othing in the trial transcript demonstrates that the zippered case was anything other than an ordinary briefcase that was simply heavy and bulging".

[3] In the instant case the paper sack was obviously from Fisher's Pharmacy [4] and its contents could be inferred from the first hand knowledge that it had been brought directly from the pharmacy under unusual circumstances, *Sanders*, 442 U.S. at 764, n. 13, 99 S.Ct. at 2593, n. 13. Accordingly, we hold that the warrantless seizure and examination of the contents of this paper sack, lying with a corresponding indifference toward any expectation of privacy, in full view on the

4. On direct examination, Lt. Smith testified as follows:

> Q. [Government Attorney]: Then what did you do?
> A. Then I looked inside the car and I saw a sack lying on the floorboard, the front seat.
> Q. Okay.
> A. And I looked inside the sack and I found a number of prescription bottles filled with Dilaudid and one with Tuinal and I noticed
> . . .
> Q. Would that sack have any inscription on it as coming from a pharmacy?
> A. Fisher Pharmacy, yes, sir.

front floorboard of the automobile was not precluded by Fourth Amendment principles.

The Briefcase

[4] *Sanders* dictates a contrary result as to the briefcase taken from the automobile trunk. The government argued the presence of exigent circumstances[5] but this is without support in the record. The contents of the briefcase located in the trunk, searched without a warrant, and the fruits of that search should have been suppressed.

REVERSED and REMANDED.

5. The Supreme Court in *Sanders* stated that "[t]here may be cases in which the special exigencies of the situation would justify the warrantless search of the suitcase. [Citations omitted]. Generally, however, such exigencies will depend upon probable contents of the luggage and the suspect's access to those contents not upon whether the luggage is taken from an automobile". 442 U.S. at 763, 99 S.Ct. at 2593, n. 11.

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